Filed 6/12/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.L., a Person Coming Under the Juvenile Court Law.	B231854
THE PEOPLE, Plaintiff and Respondent, v. J.L., Defendant and Appellant.	(Los Angeles County Super. Ct. No. VJ40126)

APPEAL from a judgment of the Superior Court of Los Angeles County. Fumiko H. Wasserman, Judge. Reversed in part and affirmed in part as modified.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Lawrence M. Daniels and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

J.L. ("appellant"), a 14-year-old boy, appeals from a judgment declaring him a ward of the court under Welfare and Institutions Code section 602 and Penal Code section 245 (section 245) and placing him home on probation.[1] Appellant's principal contention is that there was insufficient evidence of assault with a deadly weapon (ADW) or assault with force likely to produce great bodily injury (GBI), and in any event the petition cannot be sustained on both charges because they are based on the same act. We conclude substantial evidence supports both the ADW and GBI charges, but, as the Attorney General concedes, the GBI charge must be reversed. We also conclude that the appellant's statements to a police officer were properly admitted. Finally, we modify the disposition minute order to strike the maximum term of confinement.

FACTS AND PROCEDURAL HISTORY

In September 2010, 12-year-old Daniel M. and his friend Isaac A. were walking home from the movies when they saw appellant standing in his driveway with his girlfriend. Daniel recognized him from school, where appellant was one grade ahead of Daniel and Isaac. As they passed, Daniel called appellant a "punk," and thought he heard Isaac call appellant a "bitch."

Appellant chased the boys, caught up to Isaac and then punched Isaac in the left eye. Isaac fell to the sidewalk and began to cry. Appellant mocked Isaac by saying, "Cry, cry, oh, cry, cry," and continued to punch and stomp Isaac's face with the heel of his shoe. Daniel estimated that appellant punched Isaac in the face approximately four times and stomped him with the heel approximately three times. Neither Daniel nor Isaac hit appellant during the altercation.

---

[1] All future undesignated section references are to the Penal Code.

Eventually appellant's girlfriend restrained him so that Isaac could get up. Isaac was crying and bleeding from his eye and a cut on his gum. Daniel and Isaac walked away and reported the incident to Downey Police Officer Mark Caswell. Officer Caswell spoke with Isaac, Daniel and their mothers on the sidewalk in front of appellant's house and obtained a private person's arrest form for appellant.

After Officer Caswell interviewed the victims, appellant's mother invited Officer Caswell into her house to talk about the altercation. Officer Caswell interviewed appellant in his living room and photographed a cut on appellant's hand that he received from the fight. Appellant's mother, girlfriend, and an unnamed male were all present during the interview. Officer Caswell did not read appellant his *Miranda* rights before speaking with him. The record does not indicate when appellant was taken into custody.[2]

DISCUSSION

A. There Was Sufficient Evidence That Appellant Committed Assault With a Deadly Weapon

Appellant contends there was insufficient evidence of either ADW or GBI. We disagree.

1. Standard of Review

In considering a sufficiency of the evidence claim in juvenile delinquency proceedings, this court applies the same standard of review that is applicable in criminal cases. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.) Thus, this "court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is

---

[2] The People also charged appellant with ADW and GBI on Daniel, but Daniel testified that appellant did not hit or kick him. At the close of the testimony, the juvenile court dismissed the two section 245 counts involving Daniel, and we address them no further.

reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

2. Evidentiary Analysis

We start our analysis of whether there was sufficient evidence of the use of a deadly weapon with the testimony describing how the assault occurred and where it took place. As to the actual attack, the evidence was that appellant used his hands, feet and knees to hit, kick, and stomp on defendant's head.

As for the location of the assault, several different descriptors were used. First, appellant admitted to police that he hit and kneed Isaac while the latter was "on the ground." Although the initial blow to Isaac's head came while he was upright, there is no dispute that the attack continued while Isaac was down. The meaning of "ground" was not so clear from the testimony. Daniel testified that the boys were on the sidewalk when the assault started. On one occasion, Daniel stated that Isaac fell to the "floor" and appellant "kept on socking him in the face. And he was, like, stomping on him with his heel and he was messing, like, his face up and everything, so." At other times Daniel referred to the place where Isaac landed as "the ground." Daniel also stated that the boys had been walking down the "street," and that appellant came towards the younger boys from his driveway.

Whatever multiple terms were used by the witnesses, no one disputed at trial that the attack occurred on the sidewalk. During argument the District Attorney on several occasions referred to Isaac being on the sidewalk, e.g. "the sidewalk was an additional weapon." The prosecutor said Isaac's injuries were consistent with "being stomped on the ground and forcing himself [*sic*] into the sidewalk." Defense counsel argued that Daniel's testimony that appellant stomped Isaac while the latter was on the sidewalk was not credible. The import of the point was that the claim that

appellant used his foot on Isaac's head 10 times without causing major injuries was not credible, not that Isaac was not on the sidewalk.

3. Legal Analysis

Turning to the specific charges against appellant, we observe that at trial, the prosecutor suggested two theories of assault with a deadly weapon. First appellant used his hands and feet in such a manner that they became deadly weapons. The prosecutor relied on *People v. Schmidt* (1944) 66 Cal.App.2d 253, 255, for this proposition but in *Schmitt* the defendant was charged with GBI not ADW, so that case is not helpful on whether mere use of hands and fists can be ADW. (There is no dispute that hands and fists can be used in a manner that could produce great bodily injury, but that is not the issue before us.) As the Attorney General acknowledges, the Supreme Court has held hands and feet alone are not deadly weapons. "[W]e conclude a 'deadly weapon' within the meaning of section 245 must be an object extrinsic to the human body. Bare hands or feet, therefore, cannot be deadly weapons; to the extent the prosecutor's argument suggested the contrary, it was erroneous." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1034.)[3] So we reject the notion that appellant's feet and hands were deadly weapons.

The prosecutor also argued that appellant used the sidewalk as a deadly weapon even though appellant did not actually touch the sidewalk. We proceed with our analysis of this contention in two stages. First, we ask was there substantial evidence that Isaac was lying on the sidewalk and not some other place during the attack? Then we consider whether the sidewalk was used as a deadly weapon.

---

[3] The *Aguilar* court also observed: "There can be no doubt that some footwear, such as hobnailed or steel-toed boots, is capable of being wielded in a way likely to produce death or serious injury, and as such may constitute weapons within the meaning of section 245, subdivision (a)(1)." (*Aguilar*, *supra*, 16 Cal.4th at p. 1035.) Brass knuckles or weighted gloves may cause hands to become deadly weapons. (*Id.* at p. 1037.) There is no evidence that appellant adorned himself with either hobnailed shoes or brass knuckles, or anything of the sort.

Under the applicable standard, there was substantial evidence to support the implied finding that Isaac was assaulted while he was down on the sidewalk and not on some softer ground. The testimony was replete with evidence concerning the sidewalk. Isaac fell down after the first punch was administered while he was walking on the sidewalk. Although the words "ground", "floor" and "street" were used, their context suggested only alternative words for the sidewalk. There was no testimony that Isaac fell on some dirt or grass, or outside flooring, or was actually in the roadway and not on the sidewalk.

As to the second point, substantial evidence also supports the implied finding that the sidewalk was in fact used as a deadly weapon. The evidence showed that while down, Isaac was repeatedly hit and kicked. More significantly appellant stomped on Isaac's head with his heel "messing up" Isaac's face. Using Daniel's description of the incident, the sidewalk effectively became one side of a vise with the heel of appellant's foot the other side.

Appellant argues that there was no showing he "used" the sidewalk. True, he did not touch the sidewalk, nor did he smash Isaac's head up and down on the cement, or hit Isaac over the head with a piece of concrete. We nevertheless find the argument unpersuasive.

People v. Russell (2005) 129 Cal.App.4th 776 is instructive. There the defendant pushed the victim in the path of an oncoming car, causing the victim's body to be hit by the car windshield. Our colleagues in Division 7 upheld the conviction under section 245. The appellate court recognized that the defendant never touched the car, which was the actual deadly weapon. It nevertheless found the defendant had *used* the car as a deadly weapon. "The law makes clear a person who operates or drives a vehicle in an attempt to injure another person has committed assault with a deadly weapon, to wit, the car.[] Appellant would have us distinguish between the actions of one who, while driving or controlling a car, intentionally runs down a victim, and one who opportunistically utilizes, for the purpose of injuring a victim, the

force of a moving car driven by an unwitting third party. We decline to make such a distinction." (*Id.* at p. 782, italics in original.)

The *Russell* court analogized the facts before it to a situation in which one person were to propel another's body against a static object in such a manner that the object becomes a deadly weapon. "Often this situation arises when a defendant intentionally strikes a part of the victim's body against a stationary object such as a wall or building fixture, or when an assailant adds to his human strength by utilizing the force of another object.[] We find these cases helpful because they involve an assailant intentionally 'taking advantage' of an object's intrinsic qualities in a way likely to cause the victim great bodily harm, but without taking possession or control of that object." (*Russell, supra,* 129 Cal.App.4th at pp. 866-867.)[4]

The *Russell* court also relied on New York and Oregon cases with facts quite similar to ours. In *People v. Coe* (1990) 165 A.D. 2d 721 [564 N.Y.S. 255], the court found that defendant had used a "dangerous instrument" when he thrust a woman's head through a plate glass window. In *State v. Reed* (1990) 101 Or.App. 277 [790 P.2d 551], the court found that smashing a victim's head against a sidewalk was the use of a deadly weapon. (See also *State v. Montano* (1998) 126 N.M. 609 [973 P.2d 861].)

As one bard so descriptively explained away the conclusion that appellant asks us to draw: " '[W]hether the pitcher hits the stone or the stone hits the pitcher, it will be bad for the pitcher.' Cervantes, Don Quixote, Part II, ch 43 (1615)," quoted in S*tate v. Reed, supra,* 790 P.2d. at pages 551-552. We conclude substantial evidence supports the assault with a deadly weapon charge.

---

4 The cases to which the *Russell* court was referring were collected in Annotation, Stationary Object Or Attached Fixture As Deadly Or Dangerous Weapon For Purposes Of Statute Aggravating Offenses Such As Assault, Robbery or Homicide (1992–2004 Lawyers Cooperative Publishing, a division of Thomson Legal Publishing Inc.) 8 A.L.R.5th 775, sections 5, 10.

B. There Was Substantial Evidence that Appellant used Force likely to Cause Great Bodily Injury; Nevertheless, that Count Must be Stricken

Appellant also contends there was insufficient evidence to support the sustaining of the charge of assault likely to produce great bodily injury as alleged in the petition. He argues that appellant committed no more than a simple assault when he hit Isaac in the eye, cut his gum, and kicked him in the shoulder. This argument is predicated on a selective reading of the evidence, which an appellant may not do on appeal. Our discussion of the facts dealing with the use of a deadly weapon applies with equal force here. There was more than sufficient evidence to conclude that the hitting, kicking and stomping was likely to cause great bodily injury even if it did not actually do so. (*People v. La Fargue* (1983) 147 Cal.App.3d 878, 887-888 [actual bodily injury need not be inflicted to convict of GBI].)

Although there was sufficient evidence of both ADW and GBI, defendant argues, and the Attorney General conceded, that only one count in the petition can stand. We agree. Section 245 "defines only one offense, to wit, 'assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury . . . .' The offense of assault by means of force likely to produce great bodily injury is not an offense separate from – and certainly not an offense lesser than and included within – the offense of assault with a deadly weapon." (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5; see also *People v. Delgado* (2008) 43 Cal.4th 1059, 1070, fn. 4.)

Because the petition cannot be sustained on more than one count for a single incident of aggravated assault under section 245, we reverse count 2, the GBI assault. Assault with a deadly weapon is a serious felony (§ 1192.7, subd. (c)(31).) Assault likely to produce great bodily injury is not necessarily so. (*People v. Delgado, supra*, 43 Cal.4th at p. 1065.) Not only was the present crime more appropriately treated as an assault with a deadly weapon – the concrete sidewalk – no good reason exists to allow appellant to receive a lesser sanction (the absence of a serious felony prior) simply because his conduct was criminal under two different theories.

C. The Trial Court Properly Admitted Appellant's Statements Because Appellant Was Not In Custody For Miranda *Purposes*

After speaking to the victim's mothers, appellant's mother invited Officer Caswell into her home to speak with her and appellant about the incident. During this discussion appellant admitted to punching Isaac in the face and kicking him in the shoulder. During trial, appellant sought to suppress these statements because they were obtained before he was given his *Miranda* rights.

On appeal, he repeats the claim that he was "in custody" for purposes of *Miranda* when he gave his statement to Officer Caswell and, as a result, the statements should have been excluded. (See *Miranda v. Arizona* (1966) 384 U.S. 436.)

The ultimate determination of whether a suspect is in custody requires us to ask whether a reasonable person in the suspect's position would have felt that he or she was in custody. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.) In making this determination, we consider the totality of the circumstances; no one factor is dispositive. The most important considerations include " '(1) the site of the interrogation; (2) whether the investigation has focused on the subject; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' " (*In re Joseph R.* (1998) 65 Cal.App.4th 954, 958-959; see also *People v. Moore* (2011) 51 Cal.4th 386, 394-395.)

Applying the four factors described above, (1) appellant was interviewed in his home, a most familiar surrounding, (2) the focus of the inquiry was still at the investigative stage and Officer Caswell was trying to get all sides of the story from the three youths, (3) there was no objective indicia of arrest – appellant was not restrained, he was not handcuffed, Officer Caswell was invited into the house by appellant's mother, and appellant was surrounded by his mother and other people

close to him, during the interview, and (4) there was nothing in the questioning that suggested it was prolonged or aggressive.[5]

We agree with the Attorney General that the questioning of appellant in this case has strong similarities to the questioning in *In re Danny E.*, (1981) 121 Cal.App.3d 44. In *Danny E.*, officers went to minor's home at 2:00 p.m. to question minor about his knowledge of a homicide. The minor's sister opened the door and called minor to come to the door. The officer told the minor he would like to talk to him and minor went outside to speak to the officer in front of the house. The officer had not advised the minor of his *Miranda* rights. Minor admitted his involvement in the homicide. (*Ibid*.) On appeal, the minor argued that the statements made to officers in front of his home should have been excluded because he was not advised of his *Miranda* rights. The Court of Appeal disagreed, holding that the minor was not in custody for *Miranda* purposes. (*Id.* at pp. 50, 53.)

We find no error in admitting appellant's statements.

D. The Court Erred in Setting a Maximum Confinement Period Because Appellant Was Not Removed From the Physical Custody of His Parent

Under Welfare & Institutions section 726, subdivision (c), in cases where a minor is removed from the physical custody of his or her parents or guardian, the court must specify the maximum term of imprisonment that could be imposed upon an adult convicted of the same offense. The maximum term is not to be determined if the minor is not removed from the parent's custody. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.)

Here appellant was not removed from his home so the court should not have placed the maximum term of confinement in the minute order. The court stated the inclusion of the maximum term was for "recordkeeping" purposes. We discern no

---

5 The fact that Daniel's and Isaac's mothers both signed private persons arrest forms prior to the interview is irrelevant to whether appellant was in custody. The forms do not establish that appellant was or was not under arrest before he was questioned by Officer Caswell.

"recordkeeping" function that is served by including the maximum term of confinement. If the juvenile court wished to advise the minor what an adult in the same position could receive, for its possible in terrorem effect, it could have done so by telling the minor in open court.

We strike the maximum term set by the trial court in the minute order.

DISPOSITION

Count 2, assault by means likely to produce great bodily injury, is reversed; the maximum term of confinement in the court's minute order is stricken. In all other respects the judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.